

ENDANGERED SPECIES ACT OR EXTRADITION?: PROTECTING FOREIGN SPECIES IN THE AFTERMATH OF THE CECIL THE LION CONTROVERSY

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INTRODUCTION

In July of 2015, news outlets throughout the western world placed Minnesota dentist Walter Palmer in the spotlight for killing a thirteen-year-old male lion named Cecil.¹ Cecil was a major tourist attraction in Zimbabwe’s Hwange National Park and was wearing a tracking collar as part of an Oxford research project.² His death sparked an international phenomenon that placed trophy hunters in the crosshairs of animal lovers and conservationists worldwide. The manner of Cecil’s death resonated with the American public,³ prompting many debates about the humanity of killing for sport and sparking legislative attacks on trophy hunting.⁴ When

1. Editorial Board, *The Death of Cecil the Lion*, N.Y. TIMES (July 31, 2015), <https://perma.cc/WYA4-SXFV>.

2. Kerry Howley, *What We Mourned When We Mourned Cecil*, NEW YORKER (Sept. 29, 2015), <https://perma.cc/TER2-HB2J>.

3. Lucy Westcott, *Cecil the Lion’s Research Team Looks for Hope in Death of Beloved Predator*, NEWSWEEK (July 29, 2015, 2:02 PM), <https://perma.cc/643P-HGDX>.

4. See Alex Wolf, *Cecil the Lion’s Death Spurs Talk of Game Trophy Airport Ban*, LAW360 (July 30, 2015, 7:39 PM), <https://perma.cc/UBX4-4JS6>. For example, following Cecil’s “tragic demise,” New Jersey assemblyman, Tim Eustace introduced legislation in July of 2015 that would ban

Zimbabwe officials called for Palmer's extradition for violating domestic hunting laws, the lion's death presented legal implications.⁵ Later, Zimbabwe's government cleared Palmer of any wrongdoing.⁶ Yet five months after Cecil's death, in an effort to make it more difficult for hunters to bring lion trophies into the United States, the United States Fish and Wildlife Service (FWS) officially extended the protections of the Endangered Species Act (ESA) to the African lion.⁷ The response to the Cecil controversy raises important questions regarding the United States' commitment to protecting biodiversity under the ESA, addressing wildlife crime on an international level and using extradition in the prosecution of wildlife crime.

Enacted in 1973, the ESA attempts to preserve biodiversity by criminalizing conduct that jeopardizes particular species listed under the Act.⁸ Currently, the ESA falls under a judge-made rule that interprets statutes to apply domestically absent clear congressional intent to apply extraterritorially.⁹ This means the ESA applies exclusively within United States territory. Still, the drafters of the ESA clearly wished to protect foreign species,¹⁰ and the FWS currently lists foreign species for protection.¹¹ Despite this, if United States citizens go abroad and kill an endangered species, they will not face prosecution under the ESA for that action.¹² This legal loophole is troubling because it undermines the ESA's goal of preserving protected species and safeguarding biodiversity.¹³

the transportation of game trophies of threatened or endangered species through New York and New Jersey's international airports. *Id.*

5. Andrea Noble, *Cecil the Lion Extradition Request from Zimbabwe Likely Going Nowhere*, WASH. TIMES (Sept. 8, 2015), <https://perma.cc/NTS7-WCAP>.

6. Farai Mutsaka, *Minnesota Dentist Who Killed Cecil the Lion Cleared of Wrongdoing*, PORTLAND PRESS HERALD (Oct. 12, 2015), <https://perma.cc/USM6-HF9J>.

7. Erica Goode, *After Cecil Furor, U.S. Aims to Protect Lions Through Endangered Species Act*, N.Y. TIMES (Dec. 20, 2015), <https://perma.cc/6RAT-FFE9>.

8. J. PEYTON DOUB, *THE ENDANGERED SPECIES ACT: HISTORY, IMPLEMENTATION, SUCCESSES, AND CONTROVERSIES 2* (2013) ("Like other environmental regulations, the Endangered Species Act is an imperfect attempt to balance the interests of those who admire the natural world as the shared heritage of us all and those who work to meet the economic challenges of supporting our advanced standard of living.").

9. *See, e.g.*, *Small v. United States*, 544 U.S. 385, 391 (2005) (holding that the phrase "convicted in any court" encompasses only domestic, not foreign, convictions).

10. *See* Endangered Species Act, 16 U.S.C. § 1537 (2012) (calling for international cooperation to save endangered species).

11. *See Species Profile for Cheetah (Acinonyx jubatus)*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/V523-62D4> (last visited Oct. 1, 2016) (listing the *Acinonyx jubatus*, commonly known as the cheetah, as an endangered species).

12. *But c.f.* U.S. FISH AND WILDLIFE SERV., BRANCH OF FOREIGN SPECIES, ENDANGERED SPECIES PROGRAM (Apr. 2011) [hereinafter *Endangered Species Fact Sheet*] (providing that individuals may be prosecuted under the ESA or the Lacey Act if they transport any portion of their kill).

13. *See* DOUB, *supra* note 8, at 40 (explaining how new stresses impact species' populations).

This Note's objective is to explore the legal, cultural, and conservational implications of two potential solutions to this problem. First, the United States could expand the ESA's jurisdiction to cover citizens that kill endangered species in foreign countries. Alternatively, the United States could pursue a strict policy of extradition for those cases and encourage foreign nations to prosecute the offender under their own wildlife protection laws. At first glance, both solutions seem trivial. Yet, as the Cecil controversy demonstrates, the United States' position on international wildlife crime is capable of attracting national attention and sparking legal reform.¹⁴ The United States is a global leader in wildlife conservation.¹⁵ Therefore, strengthening its stance on endangered species protection would not only deter its own citizens from committing wildlife crimes, but also help legitimize wildlife protection within the world of criminal justice and influence the policy decisions of other nations.¹⁶

Using the Cecil controversy as a springboard, this Note repeatedly uses the African lion as an example of a protected foreign species because of the difficulties associated with its conservation. The United States cannot ignore trophy hunting because it is a large piece of the conservation puzzle for many foreign species and lies at the intersection of international and domestic policy. In theory, hunting can help support the conservation of wildlife.¹⁷ Yet poaching and other illegal takings of wildlife hurt both environmentalists' efforts to sustain biodiversity and hunters' abilities to maintain their sport for future generations.¹⁸ Thus, how the United States deals with its own citizens who legally and illegally hunt foreign species becomes integral to the ESA's purpose.¹⁹

When United States citizens hunt endangered species in other nations, the United States is left with two options to achieve the policy objectives of

14. See ANGUS NURSE, *POLICING WILDLIFE: PERSPECTIVES ON THE ENFORCEMENT OF WILDLIFE LEGISLATION* 70 (2015) (discussing some wildlife scholars' argument that conduct deemed environmentally harmful is "shaped by what gets publicly acknowledged to be an issue or problem warranting social attention").

15. See *CITES Trust Fund: Scale of Contributions for the Triennium 2014-2016*, CITES, <https://perma.cc/92M3-6FHY> (last visited Oct. 18, 2015) (listing each party's contribution to the convention).

16. See *infra* note 69 (discussing how criminal justice frameworks downplay international wildlife crime).

17. See generally W.G. Crosmar et al., *The Assessment of the Role of Trophy Hunting in Wildlife Conservation*, 18 *ANIMAL CONSERVATION* 136 (2015) (stating that trophy hunting may be a viable alternative to conservation in areas of dense wilderness or scarce wildlife).

18. DOUB, *supra* note 8, at 40.

19. See *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 708–09, 714–15 (1995) (dissenting Scalia and concurring Justice O'Connor agreed that the "ESA requires injury or death to individual animals, and not simply injury to the species").

the ESA: expand the ESA to apply extraterritorially or embrace an aggressive policy of extradition. Part I of this Note provides necessary background and is split into two subparts: an examination of the ESA and the United States' stance on species preservation, and an overview of United States' extradition law. Part II discusses the possibility of expanding the ESA to cover the actions of United States. citizens' in foreign nations, and it considers the implications of pursuing an aggressive policy of extradition for such cases. Ultimately, this note weighs the two options, and it concludes the overall discussion by offering suggestions on how the United States can best protect endangered species that live in biospheres outside its sovereign territory.

I. LEGAL BACKGROUND

A. *The Endangered Species Act and Other Conservation Efforts*

Congress passed the ESA in 1973 in a flurry of political action focused on environmental regulation.²⁰ The ESA has been called the “pit bull” of environmentalism²¹ not only because it provides criminal penalties for harming endangered or threatened species,²² but also because it requires government agencies to consult with an expert wildlife agency before undertaking any action that may harm a listed species or its habitat.²³ Together, these two simple concepts have enormous consequences for individuals, corporations, and government bodies. ESA expert Peyton Doub notes that preserving biodiversity nearly always involves economic trade-offs and sometimes even results in the loss of freedom.²⁴ However, as discussed below, the United States' pit bull lacks teeth when it comes to punishing United States citizens who kill endangered species in foreign lands.

The ESA affords protection to species once they are designated as “threatened” or “endangered.” Expert natural resource agencies, primarily the FWS and the National Marine Fisheries Service, are responsible for listing and delisting species under the Act.²⁵ The ESA protects listed

20. Zygmunt J.B. Plater, *From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law*, 27 LOY. L.A. L. REV. 981, 1002 (1993).

21. Paul Boudreaux, *Biodiversity and a New “Best Case” for Applying Environmental Statutes Extraterritorially*, 37 ENVTL. L. 1107, 1125 (2007).

22. 16 U.S.C. § 1540(b) (2012).

23. *Id.* § 1536(a)(2).

24. DOUB, *supra* note 8, at 39.

25. *Id.* at 49. The agencies add and remove species by rulemaking procedures provided by the Administrative Procedure Act. *Id.* at 58–60. The agencies make recommendations by following a formal rule-making process and publishing notices in the Federal Register. *Id.* at 39.

species through § 9, which prohibits the take of such species.²⁶ While the term “take” covers traditional poaching like the shooting or trapping of an animal, its definition under the act is significantly broader; it means “to harass, harm, pursue, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.”²⁷

Section 11 gives the ESA its teeth by authorizing civil and criminal penalties for violations of the Act.²⁸ The maximum civil penalty for violating the ESA is a fine of \$25,000 for each violation,²⁹ while the maximum criminal penalty for violating the ESA is a fine of \$50,000, a year in prison, or both.³⁰ The federal government rarely tries criminal cases for wildlife crime,³¹ and instead pursues the vast majority of penalties imposed for violating the ESA’s take prohibition under the civil penalties provision or the citizen suit provision.³² Weak precedent hinders the prosecution of wildlife crime and the sentencing of persons convicted of wildlife crimes.³³ As a result, the government only tends to pursue criminal charges when the unlawful conduct is particularly egregious.³⁴

Despite the ESA’s under-enforcement, criminal sanctions are critical to the Act’s success because they “communicate disincentives to commit the criminal act by identifying the distinction between acceptable and unacceptable behaviors.”³⁵ To enhance prosecution efforts and increase deterrence, many environmental advocates encourage increased sanctions.³⁶ Prosecuting wildlife crime is undoubtedly critical to achieve deterrence. Regardless of the severity of the sanctions for committing wildlife crime, Akella and Allen, advisors to the World Wildlife Fund, insist that

26. *Id.* at 51. Importantly, though not the focus of this note, the Act also protects the species’ critical habitat which is essential for the species survival. *Id.*

27. 16 U.S.C. § 1532(19) (2012).

28. *Id.* §§ 1540(a)–(b).

29. *Id.* § 1540(a)(1); see also David Miller, *U.S. Fish and Wildlife Service Increases Civil Penalties*, NOSSAMAN (June 30, 2016), <https://perma.cc/6ZHL-TFUQ> (stating that the statutory maximum civil penalties under the ESA increases after July 28, 2016).

30. 16 U.S.C. § 1540(b)(1).

31. See TANYA WYATT, *WILDLIFE TRAFFICKING: A DECONSTRUCTION OF THE CRIME, THE VICTIMS AND THE OFFENDERS* 119 (2013) (discussing prosecution, the judiciary, and the jury).

32. Ben Rubin, *Violation of Endangered Species Act Results in Jail Time and Probation*, ENDANGERED SPECIES L. & POL’Y (Mar. 28, 2010), <https://perma.cc/WBZ3-25BF>.

33. NURSE, *supra* note 14, at 150; see WYATT, *supra* note 31, at 119 (discussing the roadblocks to successful prosecution); see also WSAZ News Staff, *NEW INFO: Pair Sentenced for Killing Endangered Bats at Carter Caves*, WSAZ (Mar. 18, 2010, 1:58 PM), <https://perma.cc/7793-DCJB> (noting that it was only the second successful ESA prosecution by local authorities, implying a weak desire to prosecute).

34. See Rubin, *supra* note 32 (showcasing criminal penalties for two men who pled guilty after slaughtering 100 endangered bats).

35. NURSE, *supra* note 14, at 72.

36. WYATT, *supra* note 31, at 150–51.

“investment in patrols, intelligence-led enforcement and multi-agency enforcement task forces will be ineffective in deterring wildlife crime, and essentially wasted if cases are not successfully prosecuted.”³⁷ Because of the relative impunity enjoyed by the perpetrators of wildlife crime, high-profile cases of the type exemplified in the Cecil controversy are prime targets for federal prosecution because of their high potential for deterrence through widespread media coverage. To facilitate and legitimize wildlife prosecution, both from utilitarian and retributivist perspectives, closing loopholes in existing legislation should be a top priority.³⁸

Yet the United States—a nation with clear policy goals and fairly strict penal provisions under the ESA—does not criminalize a large swath of wildlife crime. Currently, the ESA’s take prohibition only applies domestically and on the high seas.³⁹ While the Supreme Court did not rule on the merits of the controversial case *Lujan v. Defenders of Wildlife*,⁴⁰ Justice Stevens’ concurrence concluded that § 7 of the ESA did not apply extraterritorially.⁴¹ Indeed, a “fair and sober” reading of the statute shows that Congress did not intend it to apply extraterritorially.⁴² In fact, under a judge-made rule of statutory interpretation, courts apply a presumption against extraterritoriality.⁴³ Absent a clear indication by Congress, courts interpret statutes with the assumption that Congress only intends federal statutes to apply domestically.⁴⁴ Thus, the ESA’s take prohibitions do not apply to the actions of a United States citizen who knowingly kills an endangered species in a foreign country.

However, it is clear that Congress was not indifferent to the survival of foreign species at the time of the ESA’s enactment. Section 8 of the ESA addresses species living in foreign lands.⁴⁵ Part A gives the President the means to provide financial assistance to conservation programs overseas

37. ANITA SUNDARI AKELLA & CRAWFORD ALLAN, WORLD WILDLIFE FUND, *DISMANTLING WILDLIFE CRIME: EXECUTIVE SUMMARY* (2012).

38. See NURSE, *supra* note 14, at 181 (discussing the evidence and implications of loopholes in existing wildlife legislation).

39. See, e.g., Endangered Species Fact Sheet, *supra* note 12 (showing the FWS’s position that the ESA does not apply extraterritorially to encompass foreign species).

40. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 578 (1992).

41. *Id.* at 585 (Stevens, J., concurring).

42. Boudreaux, *supra* note 21, at 1130.

43. See *id.* at 1108–11 (discussing the Supreme Court’s uneasy history with the presumption against extraterritoriality); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949) (“A canon of construction . . . teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,” so the presumption arises from an “assumption that Congress is primarily concerned with domestic conditions.”).

44. M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE* 414 (6th ed. 2014); see, e.g., *Small*, 544 U.S. at 391 (holding that the phrase “convicted in any court” encompasses only domestic, not foreign, convictions).

45. 16 U.S.C. § 1537 (2012).

“[a]s a demonstration of the commitment of the United States to the worldwide protection of endangered and threatened species.”⁴⁶ Part B calls for foreign countries to implement their own laws and conservation programs to protect the ESA’s listed species,⁴⁷ and Part C and D authorize the United States to provide assistance to foreign governments and to conduct research and investigations abroad to fulfill the purpose of the Act.⁴⁸ In addition, Congress has ratified multiple treaties to protect migratory species.⁴⁹ It is axiomatic that part of the difficulty of protecting wildlife is that mobile species do not live neatly within the lines on maps that delineate sovereign borders.

As a consequence, the FWS has listed many species under the ESA that do not actually live within the United States.⁵⁰ It can be explained that this conduct is “largely because of the U.S.’ obligations under . . . treaties governing trade in and migration of imperiled species.”⁵¹ Section 4 of the ESA, which provides for the listing of endangered species, also takes foreign nations into account.⁵² In determining whether to list a species, the government must consider whether a foreign nation has identified the species “as in danger of extinction,” and whether any foreign nation has implemented conservation measures to protect the particular species.⁵³ In a FWS distribution concerning the protection of foreign species, the Branch of Foreign Species explains that the “ESA helps to ensure that people under the jurisdiction of the U.S. do not contribute to the further decline of these species.”⁵⁴ The distribution also notes that listing foreign species under the ESA can help protect those species by increasing awareness about their endangerment, prompting research into conservation, and helping fund conservation efforts overseas.⁵⁵ It warns that listing these species is important for United States citizens because without proper permits importing or exporting listed species is illegal.⁵⁶ Yet, the informational distribution also admits that the ESA’s take prohibition only applies to activities within the United States, which clearly underscores the Act’s shortcoming.⁵⁷

46. *Id.* § 1537(a).

47. *Id.* § 1537(b).

48. *Id.* §§ 1537(c)–(d).

49. *Id.* § 1531(a)(4).

50. *Id.* § 1532(15).

51. Boudreaux, *supra* note 21, at 1129.

52. 16 U.S.C. § 1533(b).

53. *Id.*

54. Endangered Species Fact Sheet, *supra* note 12.

55. *Id.*

56. *Id.*

57. *Id.*

The ESA works in tandem with other environmental legislation, so a brief detour into these interconnected laws explains why the ESA's shortcoming is not addressed elsewhere. The other influential piece of domestic legislation in the United States is the Lacey Act of 1900, which makes it a federal offense to transport any fish or wildlife through interstate commerce if taken or possessed illegally under United States or foreign law.⁵⁸ The Lacey Act imposes civil violations upon parties who should have known that the plant or wildlife they were transporting was against the law and imposes criminal sanctions upon parties that knowingly do so.⁵⁹ Thus, while the Lacey Act implicates foreign species under foreign wildlife law,⁶⁰ the Lacey Act only concerns the transport—not the actual killing—of wildlife.⁶¹

In addition to domestic legislation, the United States is a party to many international conventions and treaties. Perhaps the most significant is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).⁶² CITES is an international treaty that regulates trading in endangered and threatened species to ensure that commercial activity does not threaten their survival.⁶³ Currently, CITES has 182 parties, showing wide adoption by the international community.⁶⁴ CITES is the only international treaty that outlines specific violations relating to wildlife crime, and it enables countries to confiscate illegally obtained animal and plant products more easily.⁶⁵

Being an international treaty, CITES has many limitations. CITES' jurisdiction only covers international trade.⁶⁶ Thus, it is fairly narrow in scope like the United States' Lacey Act. In addition, CITES is not self-executing and requires nations to implement their own domestic legislation.⁶⁷ The ESA fills this role for the United States.⁶⁸ Yet, there is a

58. Trevor Krost, *The World's Laws in American Justice: The Foreign Law Provisions of the 2008 Lacey Act Amendments*, 8 PITT. J. ENVTL. PUB. HEALTH L. 55, 58 (2013); 16 U.S.C. §§ 3371–78 (2012).

59. 16 U.S.C. §§ 3373(a)(1), (d)(1).

58. See NURSE, *supra* note 14, at 44–51 (providing an overview of the Whaling Convention, CITES, Convention on the Conservation of Migratory Species of Wild Animals, World Charter for Nature, and Convention on Biological Diversity).

61. See Krost, *supra* note 58, at 65–69 (noting a series of important Lacey Act cases, all of which only involved the transport of animals).

62. See Renee Torpy, *If Criminal Offenses Were Added to CITES, Would Nations Be Better Able to Restrict International Trade in Endangered Species and Protect Biodiversity?*, 9 BRAZILIAN J. INT'L L. 57, 58 (2013) (providing a brief history of CITES, showing that the U.S. hosted the original convention in D.C.).

63. *What is CITES?*, CITES, <https://perma.cc/X4W9-GFEM> (last visited Sept. 27, 2016).

64. *Id.*

65. Torpy, *supra* note 62, at 62.

66. *Id.* at 60.

67. *Id.* at 62–63.

fundamental policy difference between CITES and the ESA. The latter focuses solely on conserving species, whereas CITES is focused on regulating the trade of protected species.⁶⁹ While there are many different motivations for protecting endangered species⁷⁰ and many different justifications for criminalizing conduct that jeopardizes those species,⁷¹ a species-centric approach makes the ESA unique among environmental regulatory regimes. Indeed, the ESA is different from most other environmental regulations because it focuses solely on conserving biodiversity for the sake of biodiversity.⁷²

B. Extradition and International Cooperation

Extradition is the process by which a state surrenders a person to another state based on a treaty, national legislation, or principles of international law.⁷³ States use extradition as a means of cooperation in the fight against domestic and international criminality.⁷⁴ The legal doctrines that underlie international extradition are centuries old.⁷⁵ Pursuant to the maxim *aut dedere aut judicare*, states have a duty to prosecute the accused themselves or extradite the offender to the requesting state; in contemporary practice, this remains true for *jus cogens* international crimes, but extradition for domestic crimes usually rests upon explicit agreements between states.⁷⁶ In the United States, as in most other common law countries, extradition relies exclusively on treaties.⁷⁷ Alternatively, civil law countries justify extradition based on comity or reciprocity and do not necessarily rely upon treaties.⁷⁸

68. 16 U.S.C. §§ 1537(a)–(b) (2012); DOUB, *supra* note 8, at 14.

69. 16 U.S.C. §§ 1537(a)–(b) (2012); DOUB, *supra* note 8, at 14; *see also* NURSE, *supra* note 14, at 57 (explaining that from a green criminological perspective, the importance of international wildlife crime is often downplayed within criminal justice frameworks because CITES enforcement is largely concerned with regulatory breaches; failing to comply with quotas or similar conduct is not viewed as traditionally criminal).

70. *See* DOUB, *supra* note 8, at 205 (discussing the four different motivations for saving endangered species: moral, aesthetic, ecological, and practical).

71. *See* NURSE, *supra* note 14, at 19 (discussing the three main criminological perspectives on wildlife crime: environmental justice, ecological justice, and species justice).

72. *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1052 (D.C. Cir. 1997) (holding that the chief reason for the ESA was to preserve a pool of genetic biodiversity for the future).

73. BASSIOUNI, *supra* note 44, at 2.

74. *Id.*

75. *See id.* at 4 (stating that the earliest recorded extradition appears in the Old Testament). For a concise history on the origins and first instances of extradition see pages 4–7.

76. *See id.* at 9 (discussing the origins and meaning of the maxim *aut dedere aut judicare*).

77. 18 U.S.C. § 3181(a) (2012).

78. BASSIOUNI, *supra* note 44, at 8.

The very nature of extradition makes the entire process incredibly political. While the modern trend is to place enhanced duties on states through bilateral treaty obligations, many states take a state-centric approach that favors political considerations over accountability.⁷⁹ A state can reject the hosting country's assertion that the alleged conduct falls within an exception or limitation to the applicable treaty, and states often do so when such refusals align with their own political standards and agenda.⁸⁰ As such, extradition has yet to be wholly accepted as a process that serves the international community; it is hindered from achieving this status because of the "diverse political interests of states and absence of commonly shared interests and values in enforcing international criminal law as well as certain violations of national criminal laws."⁸¹ This is particularly relevant when discussing extradition in the context of wildlife crime, because states have drastically different views on the usage and treatment of animals.⁸²

Extradition has four substantive requirements: an extraditable offense, dual criminality, specialty, and non-inquiry.⁸³ Fundamentally, dual criminality is the principle that the crime charged by the requesting state is also a crime in the requested state.⁸⁴ The crime need not be identical, but only "substantially analogous."⁸⁵ The practice in the United States is to analyze the underlying facts of the case and determine whether they constitute a crime in both states' legal systems, regardless of the crimes' labeling.⁸⁶ The punishment for the crime need not be identical in both states to meet dual criminality.⁸⁷

Conflating the requirement of an extraditable offense with dual criminality is common, but they are conceptually distinct: dual criminality is a fundamental requirement for extradition regardless of how the treaty defines extraditable offense.⁸⁸ In other words, treaties list or otherwise designate extraditable offenses while simultaneously requiring dual

79. *Id.* at 10.

80. *Id.* at 53.

81. *Id.*

82. *See* Boudreaux, *supra* note 21, at 1114 (explaining that cattle, horses, and pigs are viewed differently around the world).

83. BASSIOUNI, *supra* note 44, at 497.

84. *Id.* at 500.

85. *See, e.g.,* Manta v. Chertoff, 518 F.3d 1134, 1141–43 (9th Cir. 2008) (explaining dual criminality).

86. BASSIOUNI, *supra* note 44, at 505; *see also In re Extradition of Molnar*, 202 F. Supp. 2d 782, 785–86 (N.D. Ill. 2002) (analyzing the issue of dual criminality).

87. *United States v. Riviere*, 924 F.2d 1289, 1302 (3d Cir. 1991).

88. *See* BASSIOUNI, *supra* note 44, at 500 (explaining that a treaty typically defines what offenses are extraditable while also requiring dual criminality).

criminality.⁸⁹ The enumerative method is where the extradition treaty lists the extraditable offenses,⁹⁰ and the eliminative method is where the treaty designates a formula to determine if a crime is extraditable.⁹¹ In addition to requiring dual criminality, contemporary treaties usually employ an eliminative method, which simply requires the crime be punishable by at least one year in prison. This formula rids the cumbersome method of enumerating specific offenses and reduces unnecessary litigation associated with constantly evolving penal systems.⁹²

Specialty is the principle that the requesting state can only prosecute the offender for the offense that the requested state surrendered him for. The requesting state must also limit their penalties in any ways established by the surrendering state.⁹³ This principle upholds the integrity of the extradition process by establishing trust between states and eliminating the possibility of prosecutorial abuse by the requesting state.⁹⁴ It is commonplace for United States' treaties to contain explicit provisions, which outline the requirement of specialty.⁹⁵ In addition, 18 U.S.C. § 3186 codifies specialty to some degree.⁹⁶

Lastly, the rule of non-inquiry respects each state's sovereignty. While the requirement is intended to ensure that "[n]o state can sit in judgment of another state's legal system or process," a limited inquiry allows for compliance with international human rights laws.⁹⁷ United States courts have refused to inquire into the requesting state's process for acquiring evidence of probable cause to request extradition, the foreign state's methods of conviction, or the punishment that the accused may receive if convicted.⁹⁸ Codified in 18 U.S.C. § 4100, United States courts cannot question the transferring state's method of finding the offender guilty if the offender is fulfilling her sentence in the United States.⁹⁹

89. *Id.* at 500.

88. B.H. Giles, *Extradition and International Law*, 1 AUCKLAND U.L. REV. 111, 121 (1967-1971).

91. BASSIOUNI *supra* note 44, at 508.

92. *Id.* at 511.

93. Gallo-Chamorro v. United States, 233 F.3d 1298, 1305 (11th Cir. 2000).

94. BASSIOUNI, *supra* note 44, at 541.

95. *See* Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, Italy-U.S., art. XVI, Oct. 13, 1983, 35.3 UST 3023; *see also* United States v. Rauscher, 119 U.S. 407, 420 (1886) (deciding that a defendant who was extradited to the U.S. could only be tried for the offenses that he had been extradited for).

96. 18 U.S.C. § 3186 (2012) ("The Secretary of State may order the person committed . . . to be delivered to any authorized agent of such foreign government, to be tried for the offense of which charged.").

97. BASSIOUNI, *supra* note 44, at 633.

98. *Id.* at 632.

99. *Id.* at 636-37.

II. FINDING A SOLUTION

A. Amend the ESA to Apply Extraterritorially

One way of fixing the loophole is simply to ensure that certain provisions in the ESA apply overseas. To do this, Congress need only amend the ESA to include a provision that explicitly states that §§ 9 and 11 apply extraterritorially.¹⁰⁰ Explicit textual intent would override the principle of statutory interpretation that forces courts to presume that the statute does not apply extraterritorially.¹⁰¹ With this amendment, the government would be able to prosecute United States citizens for killing endangered species outside of the United States whether or not they ship any animal parts back to the United States.¹⁰²

The first advantage to this amendment is its holistic approach. Simply applying the ESA extraterritorially would help mitigate the need to amend the ESA so as to strengthen it only in the particular areas of enforcement that resonate with the public. It would also eliminate the genesis of other regulatory laws that would only deemphasize the importance of wildlife crime.¹⁰³ Indeed, public support can be critical in sparking legal reform.¹⁰⁴ As Wyatt notes, “[c]itizens [can] play a key role in supporting the work of NGOs, pressuring their governments for action against wildlife trafficking and acting as guardians of wildlife.”¹⁰⁵ But the downside is that the public may miss the forest for the trees. Extending extra protection to only one species, like the African lion following the Cecil controversy, is prohibitively narrow in scope.

100. Such an amendment would not interfere with government funded projects overseas, but only private takings.

101. See BASSIOUNI, *supra* note 44, at 414 (stating that the United States has a presumption against interpreting a statute to apply extraterritorially); see Boudreaux, *supra* note 21, at 1108–11 (discussing the Supreme Court’s uneasy history with the presumption against extraterritoriality); see also *Small*, 544 U.S. at 391 (holding that the phrase “convicted in any court” encompasses only domestic, not foreign, convictions).

102. See generally CHARLES DOYLE, CONG. RESEARCH SERV., RS22497 EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW (2012) (discussing the constitutionality of statutes that apply extraterritorially).

103. Alyana Alfaró, *Lesniak Wants to End Shipment of Endangered ‘Trophy’ Animals to NJ*, OBSERVER (Aug. 10, 2015), <https://perma.cc/A7MZ-ZN93>. One such example is when, following the Cecil controversy, Senator Raymond Lesniak authored a bill to prohibit the transport and possession of trophy animals. *Id.*; see also Wolf, *supra* note 4 (demonstrating that New Jersey attempted to apply its own laws regarding treatment of endangered animals to international actions).

104. Westcott, *supra* note 3 (“If that enthusiasm and attention can be converted into a conservation effort then that would be a wonderful consolation, a wonderful memorial to the unfortunate death of this one animal.”).

105. WYATT, *supra* note 31, at 125.

This is particularly true because every species in an ecosystem is connected. Doub highlights this problem: “Scientists, politicians, and the American public may desire to preserve a species, designate it as endangered or threatened, and extend regulatory procedures to protect it. However, they cannot remove that species from its biological and physical environment; they cannot parse individual species out.”¹⁰⁶ On the other hand, this is a criticism of the ESA in general; some proponents of reform believe the ESA should refocus on protecting biodiversity through the protection of entire ecosystems, rather than individual species.¹⁰⁷ However, rallying around one specific species is a common tactic that conservationists and lawmakers use.¹⁰⁸

Gunn, an environmental scholar, notes that western environmentalists and trophy hunters are usually concerned with “charismatic megafauna”: large animals that because of their size or special qualities inspire a special type of awe for nature.¹⁰⁹ As an archetypal charismatic megafauna, Cecil the lion was capable of capturing widespread sympathy.¹¹⁰ Indeed, Doub notes that most of the best known endangered species are K-selected species, meaning that they have slower reproductive rates, longer life cycles, and tend to be at the top of food chains, so their populations take longer to recover after conditions are restored or limitations are removed.¹¹¹ This means, at least from certain biological perspectives, that K-selected species—which are most charismatic mega fauna—should indeed be a conservation priority. Yet, an extraterritorial amendment would be consistent with the policy objectives behind the ESA because, by extending an increased measure of protection to all listed species found outside the United States, it would holistically protect the world’s biodiversity. The ESA, rather controversially, protects a wide range of animals, the vast majority of which are not well known and are perhaps rather unsympathetic. These species also require protection, and amending the ESA to apply extraterritorially will theoretically allow prosecutors to protect these species as well as their charismatic counterparts.

Perhaps more importantly, expanding the ESA would allow the United States to retain control of prosecutions. While some foreign nations have

106. DOUB, *supra* note 8, at 19.

107. JAMES SALZMAN & BARTON H. THOMPSON, JR., *ENVIRONMENTAL LAW AND POLICY* 305 (4th ed. 2014).

108. See NURSE, *supra* note 14, at 31 (discussing how specific nature or wildlife offenses appear in legislation).

109. Alastair S. Gunn, *Environmental Ethics and Trophy Hunting*, 6 *ETHICS & ENV'T* 68, 73 (2001).

110. WYATT, *supra* note 31, at 76.

111. DOUB, *supra* note 8, at 22.

very little environmental legislation and little in the way of wildlife protections, other nations have very strict wildlife laws. Under a controversial new Kenyan law, the maximum penalty for crimes involving endangered species is life imprisonment and a fine in the amount of roughly \$230,540.¹¹² This reflects the nation's "ecocentric view that Kenyan wildlife is a valued resource integral to a functioning economy and that political will exists to deal with wildlife crime both as a national problem and as a serious crime deserving of stiff penalties."¹¹³ The United States' ESA does not come close to this type of sanction, with § 9 only warranting a maximum penalty of a single year in prison and a \$50,000 fine.¹¹⁴ Expanding the ESA to apply extraterritorially would ensure that the United States would be able to deal with these cases on its own terms, ensuring that United States citizens are not prosecuted under wildlife laws that many may find draconian.

Another important benefit related to prosecutorial discretion is that in picking and choosing which cases to actually investigate and prosecute, the United States also has the luxury of more resources than many other nations. Funding for environmental protection will always face the inevitable hurdle of competing national priorities.¹¹⁵ A lack of resources is the primary reason why wildlife laws are inadequately enforced even within more affluent nations.¹¹⁶ This underfunding contributes to why "[e]nvironmental and wildlife law enforcement as well as wildlife forensics are on the margins within the law enforcement community."¹¹⁷

The United States, in having more resources than many other countries, may actually be able to prosecute a case for which the requesting state may not have resources. In the limited number of cases where United States citizens violate both foreign law and the ESA extraterritorially, the foreign nation can be assured that the perpetrator will be punished without spending their own precious resources to conduct the prosecution. John M. Sellar, a Chief of Enforcement Support for CITES, states that "[i]n several countries in Africa and Asia, wildlife law enforcement is propped up by NGOs and foreign aid. Historically, next to no wildlife law enforcement would have

112. NURSE, *supra* note 14, at 74; Alyssa Falk, Note, *As Easy as Shooting Fish in a Barrel? Why Private Game Reserves Offer a Chance to Save the Sport of Hunting and Conservation Practices*, 3 U. ILL. L. REV. 1329, 1340 (2015).

113. NURSE, *supra* note 14, at 74.

114. 16 U.S.C. § 1540(b)(1) (2012).

115. See SALZMAN, *supra* note 107, at 289 (noting that "Congress has never provided the funds needed to ensure full recovery of endangered species under the ESA—reflecting an implicit judgment that other budgetary items are more important").

116. NURSE, *supra* note 14, at 77.

117. WYATT, *supra* note 31, at 118.

occurred in some countries had it not been for NGO support and lobbying.”¹¹⁸ Thus, for many foreign nations that already rely upon foreign aid for conservation, United States involvement in the prosecution of wildlife crime may simply be an extension of pre-existing practices.

In addition, the United States will also be able to handle cases where corruption within the foreign nation’s government allows the perpetrator to skate prosecution. According to Craig Packer, a lion expert who ran the Serengeti Lion Project in Tanzania for 35 years, corruption “subverts any good conservation practices in [big-game] hunting blocks.”¹¹⁹ In many nations, corruption is a persistent problem because low-paid officers are in charge of enforcing wildlife crime and smuggling laws.¹²⁰ In the proposed rule that added the African lion to the endangered species and threatened species lists, the FWS reported that “corruption is common in some areas within the range of the African lion,” and that the inability to control corruption in areas of extreme poverty has “a negative impact on decisions made in lion management by overriding biological rationales with financial concerns.”¹²¹ By spearheading the prosecution of its own citizens, the United States can help eliminate the chance that corruption will allow offenders to escape punishment once their transgression is identified.

Naturally, this solution is not without its problems. From an ideological perspective, expanding the ESA to apply extraterritorially could be criticized as a kind of “cultural imperialism.”¹²² Fundamentally, it drastically expands the reach of a western version of environmentalism that values biodiversity at a fundamental level. This flavor of environmental concern has the controversial tendency to place human needs beneath those of plants and animals.

If a nation has a different outlook toward wildlife and animals in general, then that value system will be reflected in their laws. Certainly, nations’ attitudes toward animals and their roles within society vary widely. A cursory survey of the world’s attitudes toward animals reveals fundamental clashes concerning certain species such as cattle and pigs.¹²³ Though CITES has many members, CITES requires its member states to

118. JOHN M. SELLAR, *THE UN’S LONE RANGER* 181 (2014).

119. Goode, *supra* note 7.

120. *See, e.g.*, WYATT, *supra* note 31, at 132. (alluding to Cambodia as an example of law enforcement corruption).

121. Endangered and Threatened Wildlife and Plants; Listing the African Lion Subspecies as Threatened with a Rule Under § 4(d) of the ESA, 79 Fed. Reg. 64471, 64491 (proposed Oct. 29, 2014) (to be codified at 50 C.F.R. pt. 17); *see infra* Part II.B (discussing extradition and international cooperation).

122. Boudreaux, *supra* note 21, at 1114.

123. *Id.*

adopt their own wildlife crime legislation, so its efficacy in deterring wildlife crime and aiding the prosecution of wildlife crime is largely slave to the strength of its members' domestic legislation. Reflecting on this, Dr. Angus Nurse, a professor of criminology and wildlife crime scholar, observes, "there is no binding international treaty for the protection of animals and thus no clear legal standard on animal protection."¹²⁴ This in itself is indicative that animal protection laws vary widely because they are rooted in cultural and societal values.¹²⁵

This is unsurprising given that criminal law is socially constructed and varies based on society's notion of proper behavior: "[T]he nature of criminal offences and punishments in respect of wildlife varies commensurate with each society's notion of wildlife's 'value', the need for its protection, and a consensus on how wildlife offenders should be punished."¹²⁶ In fact, the ESA may be the exception to the rule in terms of how wildlife is valued because property law still dominates the realm of animal protection, and people who use or own animals are usually the focus of moral concern.¹²⁷ Within Wyatt's anthropocentric "hierarchy of victims," humans who depend on wildlife for their livelihood occupy the top of the hierarchy.¹²⁸

Doub reiterates this truth about wildlife legislation: "A nation can afford to focus on ambitions such as preserving bio-diversity only when it enjoys an adequately high standard of living not to be preoccupied with basic survival, even though that survival may in fact be partially dependent on preserving biodiversity."¹²⁹ Even within countries with high standards of living, legislators can simply disagree about how wildlife crime should be addressed:

[W]hile some policymakers might consider poaching to be serious wildlife crime deserving of punishment through the criminal law, others might consider this to be property crime which can either be dealt with by the aggrieved 'owner' through the civil law, or which constitutes a 'lesser' regulatory offence worthy only of a fine.¹³⁰

124. NURSE, *supra* note 14, at 41.

125. *Id.*

126. *Id.* at 70.

127. *Id.* at 41 (noting that international law clearly reflects this because the strongest forms of international wildlife law are protective measures that allow for the continued use of wildlife as a resource).

128. WYATT, *supra* note 31, at 74.

129. DOUB, *supra* note 8, at 39.

130. NURSE, *supra* note 14, at 70.

Given these cultural and political considerations, it is unsurprising that the majority of CITES parties do not impose jail time on offenders and remain consistent with the legal tradition of imposing minimal fines for wildlife crimes.¹³¹

Boudreaux argues that, starting with the proposition that the presumption currently bars the ESA from applying extraterritorially, American law has the best chance of being applied where American values do not clash with the foreign nation's values and there is "factual spillover" that implicates the United States directly.¹³² He reasons that "[i]f applying law extraterritorially would insinuate American social standards into a foreign society, the more likely it is that there would be a direct clash of cultures, and the more sensible it is to apply the Presumption."¹³³ Indeed, in *Foley Bros., Inc. v. Filardo*, the Supreme Court referred to this policy-based argument for the presumption against applying statutes extraterritorially.¹³⁴ As one author put it, the Court showed a concern regarding "the potential cultural troubles that might be stirred up by imposing the values and requirements of United States law inside the borders of another nation."¹³⁵ Importantly for Boudreaux, if the "clash" is a "true conflict" of colliding laws, it is consistent with international comity to give precedent to the "home" nation's law; if however, the "clash" is merely "indirect social friction," where the other country simply does not understand American law, then it may not always make sense to default to the other country's law.¹³⁶

In extending the ESA to apply to every nation in the world, there will undoubtedly be "clashes" between how the ESA values endangered species and how the host nation values them—if at all. While this cultural divide is certainly a valid concern, most nations are likely to share values concerning endangered species. This is because there is greater international consensus when dealing specifically with endangered species: CITES protects them; there is a retributivist element that indicates predation on endangered species is a more serious crime; and there exists a general conception that

131. Torpy, *supra* note 62, at 65.

132. Boudreaux, *supra* note 21, at 1116.

133. *Id.* at 1123.

134. *Foley Bros.*, 336 U.S. at 285 ("A canon of construction . . . teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States," so the presumption arises from an "assumption that Congress is primarily concerned with domestic conditions.").

135. See Boudreaux, *supra* note 21, at 1123 (stating also that this policy reasoning for the presumption was reaffirmed by the Supreme Court in *Equal Emp't Comm'n v. Arabian Am. Oil Co.*, 499 U.S. 244, 258 (1991)).

136. *Id.* at 1113.

endangered species are less capable of withstanding criminal activity.¹³⁷ Thus, the threat of a cultural clash may be smaller than anticipated with regard to the taking of individual members of an endangered species.

Here, it is worth noting how the FWS has worked around this jurisdictional problem by regulating foreign species in United States territory. As established earlier, the ESA already lists species that are not native to United States soil. Yet, because the ESA does not apply extraterritorially, the listing of these species only affects the shipping and trading of the listed animal and their byproducts within the United States' jurisdiction. As such, the United States does not interfere directly with other nations' laws, but simply regulates the species within its own borders.¹³⁸ An expansion of the ESA as proposed will have a similar effect. In practice, it will only be used to prosecute United States citizens, so rather than imposing western values on the rest of the world, it would only regulate United States citizens' conduct.

These regulations also highlight the apparent practical difficulties associated with attempting to protect a species that only lives on foreign soil. Despite the fact that the United States may have more resources to dedicate to wildlife crime, the United States will largely be reliant on the foreign government itself for evidentiary matters. Witnesses and physical evidence may be thousands of miles away from the nearest United States courtroom, creating significant difficulties for the prosecution. Wildlife crime means that investigations are burdensome because

several agencies may be involved in enforcement including customs, border and immigration agencies, police, environmental protection agencies and conservation monitoring agencies. The international law mechanisms . . . are usually not applicable to individual and corporate wildlife crimes and so this form of wildlife offending becomes an international crime problem.¹³⁹

Thus, United States investigations usually entail an international component.¹⁴⁰ That this practice already exists, however, is not telling. The United States may still be entirely subject to the cooperation of the foreign government for much of its case. This completely undermines one of the

137. NURSE, *supra* note 14, at 152.

138. *See infra* Part II.B (discussing extradition and international cooperation).

139. NURSE, *supra* note 14, at 61.

140. *See St. Cloud State University Professor Pleads Guilty to Trafficking in Elephant Ivory and Rhinoceros Horn*, U.S. FISH & WILDLIFE SERV. (Jan. 14, 2016), <https://perma.cc/4BC9-ZB69> (discussing how the convicted individual smuggled and illegally exported elephant ivory into and out of the U.S.).

fundamental reasons for expanding the ESA to apply extraterritorially: independent action.

B. Pursue an Aggressive Policy of Extradition for Wildlife Crime

Rather than amending the ESA to apply extraterritorially, the United States could adopt a hardline policy on extraditing offenders who commit wildlife crime in other nations. Extradition is not an entirely uncommon process, and while there are no official statistics, it is estimated that the United States is likely involved with 300 extradition cases a year.¹⁴¹ States have extradited offenders solely for wildlife crime.¹⁴² Obviously, the foreign nation requesting the United States citizen would be responsible for the prosecution. For endangered species-based wildlife crime, the four substantive requirements of extradition are likely to be met.¹⁴³ First, most modern extradition agreements use the eliminative method for determining what constitutes an extraditable offense, requiring the crime to be punishable in both nations by at least one year in prison.¹⁴⁴ Because the ESA does allow for a criminal sanction of a year in prison,¹⁴⁵ the extraditable offense requirement is likely to be met in most scenarios where the foreign government is requesting extradition.¹⁴⁶

Second, the same reasoning provides that dual criminality is also likely to be unproblematic because most nations have wildlife crime laws for endangered species, and the foreign government would not have made the request if it lacked applicable laws to prosecute the offender.¹⁴⁷ The last two requirements for extradition, specialty and the rule of non-inquiry, are also unproblematic when the harboring nation is willing to extradite the accused for a specific crime.¹⁴⁸

Since extradition is technically a function of the executive branch,¹⁴⁹ adopting this kind of foreign affairs policy is possible. Ultimately, the executive's decision to grant extradition or to refuse extradition—even

141. BASSIOUNI, *supra* note 44, at 52 n.291.

142. *Irish National Extradited to the United States from the United Kingdom for Trafficking of Rhinoceros Horns*, U.S. DEP'T JUST. (Sept. 22, 2015), <https://perma.cc/DLH6-E3TK>.

143. BASSIOUNI, *supra* note 44, at 497.

144. *Id.* at 514.

145. 16 U.S.C. § 1540(b)(1) (2012).

146. *See Member Countries*, CITES, <https://perma.cc/BRW7-26Y3> (last visited Sept. 1, 2016) (showing an increase in the number of Parties to CITES since commencement).

147. BASSIOUNI, *supra* note 44, at 499.

148. *See infra* Part II.B (discussing extradition and international cooperation).

149. *See* BASSIOUNI, *supra* note 44, at 974–75. Executive discretion is exercised by the secretary of state and is derived from the Constitution, which authorizes the president to conduct foreign affairs. *Id.*

though the offender may be deemed extraditable—is unreviewable.¹⁵⁰ The Supreme Court, however, has held that the President does not have the power to extradite outside of treaty or legislative power.¹⁵¹ While extremely unlikely, the United States could also implement legislation to try to foster this type of international cooperation and establish extradition treaties.¹⁵² As stated before, the United States already has a wide network of bilateral extradition treaties in place.¹⁵³ Of course, there are certainly many nations where extradition treaties are not in effect.¹⁵⁴ Certain political realities may mean that negotiating extradition treaties with certain nations is simply impossible and that extraditing United States citizens to those countries for any crime whatsoever would be politically irresponsible.¹⁵⁵ In any event, utilizing extradition for this purpose would strengthen the United States' role as a leader in conservation efforts and increase the level of international cooperation in fighting wildlife crime.

Using extradition to prosecute wildlife crime would also increase the United States' credibility on the international stage because adopting this approach respects foreign nations' sovereignty to the utmost degree. Rather than encounter a slew of jurisdictional issues when attempting to prosecute a United States citizen for a crime committed in another jurisdiction, the extradition process remains remarkably simple.¹⁵⁶ If the offense occurred within a sovereign nation and impacted wildlife within its sovereign borders, that nation has the privilege of enforcing its own rule of law.¹⁵⁷ There is no chance that the United States oversteps any boundaries, jurisdictional or cultural. The United States need not worry about embarking on a kind of cultural imperialism because American values become irrelevant when the prosecuting nation has their own version of the ESA.

150. *Id.* at 975.

151. *Id.* at 91.

152. *See id.* at 71. Federal legislation supplements extradition treaties rather than replacing them, and if a treaty provision conflicts with legislation, the treaty prevails. *Id.*

153. *See* DOYLE, *supra* note 102, at 29 (stating that the United States has bilateral extradition treaties with two-thirds of the world).

154. BASSIOUNI, *supra* note 44, at 1036–37 (providing a list of countries with which the U.S. does not have a bilateral extradition treaty).

155. *See id.* at 499 (explaining that the United States does not have to extradite its citizens to a foreign jurisdiction unless a treaty requires it to extradite the citizen).

156. *Id.* at 362. The requesting state has subject-matter jurisdiction and the requested state has *in personam* jurisdiction—the requesting state then has *in personam* jurisdiction once the extradition has taken place. *Id.*

157. *Sovereignty*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining sovereignty as the international independence of a country with the “right and power of regulating its internal affairs”).

Nor is there the chance that the United States offends a foreign nation by commandeering its right to determine how to use its own natural resources. Across Africa, trophy hunting generates around \$200 million dollars each year.¹⁵⁸ Killing a single lion, after trophy fees and the price of a several day safari, can cost a hunter up to \$71,000 dollars.¹⁵⁹ In summarizing the relationship between the state and wildlife, Wyatt notes that “[l]ive wildlife has economic value to the state and to people so when they are threatened or stolen, people become victims of these crimes because of the financial loss.”¹⁶⁰ From this standpoint, using extradition to fight wildlife crime is logical because it allows the governing body of the people wronged by the crime to distribute justice.¹⁶¹ The loss of threatened or endangered species can lead to further forms of economic victimization because extinctions or decreasing populations can limit the economic benefits generated by wildlife, like eco-tourism.¹⁶² For this reason, the rarity of endangered species alone can create incentives for their home nations to protect them, just as it may simultaneously increase the incentive for poachers to target them.¹⁶³

Once wildlife is viewed as a natural resource, it follows that each nation should be able to determine how they will use and protect that resource. Threats to endangered species come from many sources, the largest of which is usually habitat loss, but the taking of species can also contribute to biodiversity loss.¹⁶⁴ These takings occur in the form of legal hunting and illegal killings. Organizations have made different determinations as to whether legal hunting negatively impacts conservation efforts.¹⁶⁵ Extending the ESA to reach animals around the world will inevitably conflict with nations’ hunting laws, many of which actively permit the hunting of

158. Bigad Shaban et al., *American ‘Trophy’ Hunters Kill Endangered, Threatened Animals Abroad Almost Daily*, NBC NEWS (Nov. 13, 2015), <https://perma.cc/P2LZ-TEJ2>.

159. *Id.*

160. WYATT, *supra* note 31, at 66.

161. *See* United States v. Cotroni, [1989] 1 S.C.R. 1469 (Can.) (allowing Canada to extradite defendant to the U.S. because that is where the harmful impact occurred).

162. WYATT, *supra* note 31, at 132.

163. *Id.* at 107.

164. *Impact of Habitat Loss on Species*, WORLD WILDLIFE FUND, <https://perma.cc/KU9B-VVFJ> (last visited Sept. 20, 2016); NURSE, *supra* note 14, at 40.

165. *See, e.g.*, N. Leader-Williams, *Trophy Hunting of Black Rhino Diceros Bicornis: Proposals to Ensure Its Future Sustainability*, 8 J. INT’L WILDLIFE L. & POL’Y 1, 4 (2005) (explaining how trophy hunting can benefit conservation efforts); *See also, e.g.*, Teresa M. Telecky, *Hunting Is a Setback to Wildlife Conservation*, EARTH ISLAND J., <https://perma.cc/XRX4-3MNK> (last visited Oct. 24, 2016) (explaining why trophy hunting, even when done in an effort to conserve a species, does not work to conserve species).

protected species.¹⁶⁶ The result in many instances, would be interference with other nation's self-determined policy on wildlife conservation.

Undoubtedly, illegal takings harm endangered species, but it is critical to recognize that most takings are inextricably tied to the local communities that are in physical proximity to the species. Impoverished hunters and traders may use the income from illegally poached wildlife to help supplement their incomes.¹⁶⁷ In Wyatt's "hierarchy of victims," poachers are conceptualized as victims because they may commit wildlife crime out of economic necessity.¹⁶⁸ Alternatively, indigenous people may consider hunting protected animals as part of their tradition or religion.¹⁶⁹

Yet, the illegal taking of endangered species also occurs for non-economic reasons. Nurse notes that even Interpol's definition of wildlife crime that focuses on "wildlife trafficking, illegal exploitation, and trade" is restrictive and misleading because wildlife crime extends beyond activities for economic gain.¹⁷⁰ Collectors who illegally take wild eggs for example, are not known to sell their collection.¹⁷¹ A study conducted on convicted poachers in Kentucky suggests that a significant number of offenders knew they were violating regulations but insisted that they were minor or technical infractions.¹⁷² While financial gain was one motivation for their offense, others included pursuing a tradition or hobby, or feeling power or excitement.¹⁷³ These motivations, seen by many as reprehensible,¹⁷⁴ are likely to create repeat offenders and increase the illegal killings that occur under the guise of legal hunting.¹⁷⁵ Unlike legal trophy hunting, which can benefit the species, these illegal takings do not benefit the species nor are they linked to the perpetrator's economic need.

The types of killings that result from human conflict are also distinct from legal hunting, like when a farmer kills a lion to protect his cattle. According to the FWS, human conflict is the greatest threat to remaining

166. WYATT, *supra* note 31, at 107. Rather controversially, there are exceptions in place so that CITES Appendix I species, those with the utmost international protection, may be hunted. *Id.* One example is trophy hunting of rhinoceroses. *Id.* Despite their dwindling numbers, some regulated hunting of rhinos remains legal. *Id.*

167. Torpy, *supra* note 62, at 63.

168. WYATT, *supra* note 31, at 75.

169. Torpy, *supra* note 62, at 63–64.

170. NURSE, *supra* note 14, at 23.

171. *Id.* at 27.

172. *Id.* at 102–04.

173. *Id.*

174. See generally Gunn, *supra* note 109 (discussing the implications and views of hunting when used to promote or protect nontrivial human interest).

175. NURSE, *supra* note 14, at 103.

lion populations.¹⁷⁶ Alastair Gunn, an environmental ethicist, insists that the vast majority of people, “unlike Western environmentalists, are poor and the loss of even a small proportion of their crops or flocks may mean disaster. Therefore, unlike ‘us,’ they need to kill their animal competitors.”¹⁷⁷ This is where advocates of trophy hunting find their footing: arguing for an alignment of incentives. Advocates insist that trophy hunting provides value to wildlife because it incentivizes individuals to protect wildlife.¹⁷⁸ Take the poor farmer that Gunn envisions, whose cattle are being eaten by a lion, provided that the farmer can profit immensely if the lion stays alive—by for example, selling the right to hunt the big cat on his land—he lacks incentive to kill the lion.

Indeed, there are instances in which regulated hunting on private game preserves has led to great conservation success.¹⁷⁹ Though listed on Appendix I on CITES from overhunting, moving White Rhino populations to private lands and permitting regulated trophy hunting helped the rhino’s population increase from 840 in 1960 to 6,770 in 1994.¹⁸⁰ While the public becomes more sensitive to federal spending, private game preserves may help government agencies conserve wildlife by reducing spending and more efficiently allocating resources through responsible oversight of private ownership.¹⁸¹ One proponent sums it up succinctly: “Turning a profit . . . is sometimes the only way to compel people to respect and value underappreciated assets.”¹⁸²

The newly accepted regulations concerning the African lion demonstrate that the FWS accepts that trophy hunting can have conservational benefits. Five months after Cecil was shot and killed in Zimbabwe, the Obama Administration finally approved a proposed rule that placed the African lion under the protection of the ESA.¹⁸³ Lions in Central and West Africa will be classified as endangered, and lions in Southern and

176. Endangered and Threatened Wildlife and Plants; Listing the African Lion Subspecies as Threatened with a Rule Under § 4(d) of the ESA, 79 Fed. Reg. 64471, 64491 (proposed Oct. 29, 2014) (to be codified at 50 C.F.R. pt. 17).

177. Gunn, *supra* note 109, at 81–82.

178. Falk, *supra* note 112, at 1353; *see also* Gunn, *supra* note 109, at 89 (“Africans, like Western environmentalists, are entitled to a materially adequate standard of life. They cannot and should not be expected to protect wildlife if it is against their interest to do so.”).

179. *See, e.g., Hunting and Conservation in South Africa*, AFRICAN SKY HUNTING, <http://www.africanskyhunting.co.za/articles/hunting-and-conservation.html> (last visited Oct. 10, 2016) (illustrating how legal hunting on private game preserves has helped conserve species like the white rhinoceros).

180. Falk, *supra* note 112, at 1357.

181. *Id.* at 1358.

182. *Id.* at 1362.

183. Goode, *supra* note 7.

East Africa will be classified as threatened.¹⁸⁴ Notably, the rule allows trophies to be imported from nations where lions are listed as threatened so long as the lions are hunted legally and the countries have “scientifically sound management program[s] that benefit the subspecies in the wild.”¹⁸⁵ Generally speaking, this is the United States’ policy for all vulnerable species that can be used for trophy hunting.¹⁸⁶

Thus, the new rule attempts to minimize United States involvement in the decreasing lion populations by generally prohibiting lion imports but allowing an exception for hunting trophies where the state can show hunting will actually benefit conservation efforts.¹⁸⁷ This type of regulation faces much criticism. Trophy hunting legitimizes the killing of endangered species, and it allows for poached animals to be fraudulently labeled as legally obtained.¹⁸⁸ It also blurs the line between what activity is moral and what is not, so it deemphasizes the importance of wildlife crime by reemphasizing the framework of regulation.¹⁸⁹ Importantly, however, this kind of policy does not address the killing itself—only the ability to bring back trophies—and therefore does not address the individuals who hunt or commit wildlife crime for excitement or to feel powerful.

Whether or not trophy hunting is a positive tool in protecting endangered species,¹⁹⁰ an extradition-focused approach will not create inherent conflict between domestic conservation strategy and United States law. Such a conflict can already be seen wherever the FWS determines that a nation’s trophy hunting does not support conservation efforts, but the host country continues to condone the practice.¹⁹¹ An extraterritorial expansion

184. *Id.*

185. *Id.*

186. Shaban, *supra* note 158.

187. *Id.*

188. WYATT, *supra* note 31, at 111.

189. See Gunn, *supra* note 109, at 76 (commenting that for many game parks that are permitted to sustain populations of trophy species, the “animals are usually drawn from surplus national park populations, or are purpose bred like Christmas trees”).

190. See generally Fred Nelson et al., *Trophy Hunting and Lion Conservation: A Question of Governance?*, 47 ORYX 501 (2013) (reviewing the impact of trophy hunting in conservation efforts); see generally L. Palazy et al., *Rarity, Trophy Hunting and Ungulates*, 15 ANIMAL CONSERVATION 4 (2012) (discussing the effects that the demand of trophy hunting has on trophy species); see generally P.A. Lindsey et al., *Economic and Conservation Significance of the Trophy Hunting Industry in Sub-Saharan Africa*, 134 BIOLOGICAL CONSERVATION 455 (2007) (reviewing the scale of the trophy hunting industry and assessing positive and negative issues related to hunting and conservation in Africa); see generally R. Buckley & A. Mossaz, *Hunting Tourism and Animal Conservation*, 18 ANIMAL CONSERVATION 133 (2015) (proposing the need for a broad analytical approach to resolve disputes between proponents and opponents of hunting tourism for animal conservation); W.G. Crossmary et al., *supra* note 17, at 139.

191. *Import of Elephant Trophies from Tanzania & Zimbabwe*, U.S. FISH & WILDLIFE SERV., <https://perma.cc/5G8Y-8ZGN> (last visited Sept. 1, 2016).

of the ESA would increase, rather than decrease, this conflict of laws. An extradition-based approach also enjoys the benefit of encouraging states' experimentation with different systems of conservation, like one based on the commoditization of wildlife.

Lastly, foreign nations are best suited to deal with species that live within their borders. If a nation contains habitat for a certain species, then not only is that nation best able to implement programs to protect that species, but that nation is also physically and lawfully in control of that species.¹⁹² David Hayes, a former Deputy Secretary of the United States Department of the Interior, oversaw the regulation of sport-hunted trophy imports under Presidents Clinton and Obama, and admits that it is "tough because these are [FWS] biologists sitting here in the United States, making decisions about what [is] going on over in Africa."¹⁹³ Physical access to the species' habitat allows the host nation to be in the best position to conduct research and keep up to date on current events and trends.

Just like expanding the ESA to apply extraterritorially, pursuing a policy of extradition for suspects wanted for committing wildlife crime does have its drawbacks. The largest concern is the number of nations eligible to participate in this kind of policy. Given that the majority of CITES' parties do not impose jail time on offenders,¹⁹⁴ killing an endangered species will only be considered an extraditable offense in less than half of the world's nations. This is extremely problematic because it significantly narrows the number of countries that could participate in a United States-led extradition policy for wildlife crime. In turn, this drastically reduces the amount of habitat—and therefore endangered species—that can arguably be extended protection. As such, even though countries with sufficiently punitive wildlife crime laws can partake in this kind of international cooperation with the United States, they would be a minority in the world at large.

Another concern is the quality of other nations' criminal justice systems. While Kenya is an extreme case,¹⁹⁵ nations may have very severe sanctions for wildlife crime that the United States may not condone. Additionally, there may be concerns about a United States citizen being in poor incarceration conditions once they are convicted. While a limited review of the other nation's practices may be permissible to determine if

192. See, e.g., Sophia Yan, *How China's Booming Panda Business Works*, CNN (Oct. 15, 2013, 5:00 AM), <https://perma.cc/NG9F-APVY> (noting that China lends out its rare pandas at \$1 million per year per pair).

193. Shaban, *supra* note 158.

194. Torpy, *supra* note 62, at 65.

195. *Supra* Part II.A and note 12 (discussing Kenya's criminal penalty for taking an endangered species).

their criminal justice system violates basic human rights,¹⁹⁶ the rule of non-inquiry forbids United States courts from inquiring into the state's criminal procedure and punishments.¹⁹⁷ In certain cases, however, the rule of specialty will mitigate this problem, which will allow the United States to limit the crimes that the requesting state can prosecute and even limit sanctions for those crimes if the accused is convicted.¹⁹⁸ Of course, this kind of mitigation is problematic because it begs the question as to whether it is more functional for the United States to punish the perpetrator itself under morally and culturally accepted sanctions.¹⁹⁹

Costs, both monetary and political, are also an important consideration. Practically speaking, extradition is very costly. As touched on before, a massive amount of resources goes into the incredibly burdensome process of creating and updating treaties.²⁰⁰ The United States' practice of relying on treaties is burdened by state succession, war, dying diplomatic relations, and the practice of constantly updating and amending a plethora of treaties with a growing number of nations.²⁰¹ There is also the worry that nations can shirk their treaty obligations, despite being legally bound.²⁰² In comparison to the behind-the-scenes work involved with diplomatic relations and treaty creation and maintenance, the literal costs of extradition are small.²⁰³ But in addition to monetary cost, there is also risk that exposes the United States to political cost. As international crime grows and domestic criminals become increasingly mobile, the need for extradition procedures increases. A major concern is that in the face of limited resources and capabilities, states may use informal processes and bend or break international treaty obligations and procedural safeguards.²⁰⁴ This is something the United States must be wary of, particularly if it wants to polish, and not tarnish, its international reputation.

In addition to costs to the United States, extradition may also impose unbearable costs on the requesting state. In a world with limited resources, the requesting nation may not have sufficient resources to prosecute wildlife crimes. Wildlife crime simply may not be a priority, particularly in impoverished countries or those facing political or civil unrest. As the FWS

196. BASSIOUNI, *supra* note 44, at 633.

197. *Id.* at 632–33.

198. *Supra* Part I.B.

199. *Supra* Part II.A.

200. BASSIOUNI, *supra* note 44, at 91.

201. *Id.*

202. NURSE, *supra* note 14, at 43.

203. See 18 U.S.C. § 3195 (2012) (stating that costs and expenses incurred during the extradition process will be paid by the requesting government).

204. BASSIOUNI, *supra* note 44, at 58.

reported in their proposed rule to protect the African lion under the ESA, “[s]everal of the range countries of African lion have experienced political instability for many years. . . . Political instability results in wars and famine, which essentially halt conservation efforts and the enforcement of existing wildlife protection laws.”²⁰⁵ Of course, as discussed above, protecting wildlife through commoditization may be a way to combat poverty. Yet, introducing conservation or privatization programs and prosecuting those who violate wildlife laws may be impossible in areas of the world where government itself is unstable. In those circumstances, the animals that require protection are left without sanctuary or guardian.

CONCLUSION

This Note was designed to tackle one question: given the many moving parts of endangered species conservation, what can the United States do to better protect endangered species abroad? Both amending the ESA to apply extraterritorially and extraditing United States citizens wanted for wildlife crime are possible approaches to ensure United States citizens do not escape prosecution for killing endangered species in foreign lands. Both approaches have clear strengths and weaknesses.

On paper, extending the ESA to apply extraterritorially has remarkably few downsides. It allows the United States to prosecute United States citizens for violating the underlying policy objectives of the Act, including media-covered cases that are ripe with deterrent utility. Since it would only be used to prosecute United States citizens, it would constitute a limited intrusion into another nation’s sovereignty. Many nations already depend upon foreign aid for wildlife conservation and protection, so this process would be a natural extension of that dependence. Further, because the FWS already accepts that trophy hunting can actually promote the conservation of protected species if handled correctly, it does not appear that the ESA would conflict with a state’s right to determine how best to protect its resources.

Logistically however, the extraterritorial application of the ESA may be burdensome. If the FWS does not condone the hunting program of a certain nation, then United States law and foreign law would conflict. This is particularly troublesome in light of the fact that the foreign nation has the best access to their own species, and their determination as a sovereign should arguably be respected at all costs. In addition, the United States

205. Endangered and Threatened Wildlife and Plants; Listing the African Lion Subspecies as Threatened with a Rule Under § 4(d) of the ESA, 79 Fed. Reg. 64471, 64491 (proposed Oct. 29, 2014) (to be codified at 50 C.F.R. pt. 17).

would have significant trouble prosecuting unlawful takings under the ESA under these circumstances, because the United States will need the cooperation of the foreign government for evidentiary purposes.

Extradition on the other hand, is attractive because it respects traditional state roles and the foreign nation's sovereignty is left intact. The nation can administer justice for the violation of its laws and the loss of its precious resource. Yet, cultural and conservational differences mean that the majority of the nations in the world will not sufficiently punish endangered species violations to consider them an extraditable offense. This severely limits extradition as a means of ensuring wildlife crime offenders do not escape punishment.

From the foregoing discussion, it is clear that both of the outlined approaches face the same difficulty: international cooperation. In either scenario, the United States cannot and should not act alone. By its nature, the process of extradition is one of international cooperation. It is limited, however, by each nation's set of priorities as well as procedural components, which allow nations to pass on their obligations to their fellow sovereigns. Even if the ESA is given extraterritorial application, from a logistical standpoint, United States authorities will be unable to prosecute without some form of international cooperation.

As a result, a combination of both methods may be the best solution. This way, the United States at least has a legal apparatus in place to prosecute United States citizens who kill endangered species and then return home. It can use its extraterritorial reach in circumstances where the foreign nation requires help in safeguarding its endangered species. Prosecutorial discretion would be key to ensuring that sovereignty is not infringed upon or that cultural values are not stomped underfoot. On the other hand, if a state does request extradition, then the United States should comply in order to set an example for the international community.²⁰⁶ This multi-faceted approach would need to be conscientious and flexible. Indeed, as Nurse notes, "the enforcement of wildlife law at an international level may need to strike a balance between conserving resources, respecting state sovereignty and allowing for cultural differences in the treatment of and respect for animals as having intrinsic value."²⁰⁷ The hardest case would be when foreign law conflicts with the ESA or a FWS determination that hunting of the species in a foreign nation is unsustainable and contrary to conservation. In this case, it is a dicey proposition for the United States to prosecute independently, and it seems that legally it may be safest to

206. BASSIOUNI, *supra* note 44, at 494.

207. NURSE, *supra* note 14, at 56.

defer to the nation's determination about the best way to rule the kingdom of creatures within its borders.

With these difficulties in mind, the United States should look outside of the four corners of the ESA to preserve biodiversity internationally. In addition to the measures discussed in this Note, the United States should use its leadership position in conservation to leverage CITES as a mechanism for international cooperation and intelligence gathering. It should use CITES to spur nations to ratchet up their criminal penalties for wildlife crime violations so that they become part of the extradition network. The United States should also spearhead other international projects that encourage states to join the fight against wildlife crime. To give one successful example, CITES has recently joined with the International Consortium on Combating Wildlife Crime (ICCWC) to “provide globally-coordinated support to national law enforcement agencies and a more integrated response to wildlife and forest crime.”²⁰⁸ The consortium has provided hands-on training in specialized investigation techniques to law enforcement from 28 countries.²⁰⁹ ICCWC is credited with orchestrating and funding Operation COBRA III in 2015, which resulted in 139 arrests and over 247 seizures of blacklisted animal products.²¹⁰ The problems discussed in this Note indicate that, in an age of increased mobility and global interconnectedness, worldwide teamwork is needed to successfully fight wildlife crime and ensure that wildlife offenders are prosecuted to the fullest extent of the law.

208. John E. Scanlon, *Strengthening Front-Line Action to Combat Wildlife and Forest Crimes*, UN CHRON. (Sept. 2014), <https://perma.cc/XD7N-4D7L>.

209. *Id.*

210. *Successful Operation Highlights Growing International Cooperation to Combat Wildlife Crime*, CITES, <https://perma.cc/Y69H-MPBX> (last visited June 18, 2015).